STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE J.K., Minor.

Supreme Court
No.: 121410

_____/

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

Court of Appeals
No. 235602

v

Kent County Circuit
Court No. 99-0515-01 NA

MELISSA KUCHARSKI,

Respondent-Appellant.

_____/

PETITIONER-APPELLEE'S SUPPLEMENTAL BRIEF

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT ERR IN TERMINATING APPELLANT'S PARENTAL RIGHTS FOR FAILURE TO PROVIDE PROPER CARE AND CUSTODY FOR HER CHILD?

Trial Court made no answer.

Defendant-Appellant answers, "Yes."

Plaintiff-Appellee answers, "No."

II. WHERE THE TRIAL COURT NEEDED ONLY ONE STATUTORY GROUND FOR TERMINATION AND FOUND CLEAR AND CONVINCING EVIDENCE SUPPORTING TERMINATION UNDER MCL 712.19b(3)(g); MSA 27.3178 (598.19b)(3)(g) (FAILURE TO PROVIDE PROPER CARE AND CUSTODY), IS A FINDING THAT TERMINATION ALSO WAS WARRANTED UNDER A STATUTORY GROUND NOT ALLEGED IN THE TERMINATION PETITION (TO WIT, MCL 712.19b(3)(c)(ii); MSA 27.3178(598.19b)(3)(c)(ii)) HARMLESS?

Trial Court made no answer.

Defendant-Appellant answers, "No."

Plaintiff-Appellee answers, "Yes."

BACKGROUND

Appellee filed a petition to terminate parental rights on April 27, 2000,[1] alleging two statutory grounds for termination, to wit: MCL 712A.19b(3)(c)(i) and (g); MSA 27.3178 (598.19b)(3)(c)(i) and (g) (failure to rectify conditions leading to adjudication and failure to provide proper care and custody). The family court found clear and convincing evidence that Appellant failed to provide proper care and custody for her child under section 19b(3)(g). While only one statutory ground need be supported to terminate parental rights, the court also found that termination was warranted under MCL 712A.19b(3)(c)(ii); MSA 27.3178 (598.19b)(3)(c)(ii) ("other conditions" provision).

In terminating Appellant's parental rights, the court found that "bonding and attachment problems" between Appellant and her son were "significant barriers" to reunification, and thus a primary reason for termination. (March 30, 2001 Opinion, hereafter "Opinion", 6, 8). The court explained that Appellant had "a long history of not being attentive to [her son's] needs," and despite being given many chances, the child's needs were unmet by Appellant. (Opinion, 6, 10-11). The Court of Appeals upheld the family court's termination decision and denied Appellant's motion for rehearing.

Appellant then filed an application for leave to appeal before this Court, which remanded the matter for findings concerning the "present circumstances" of Appellant and her child (see August 8, 2002 Order). On remand, the family court held a hearing on August 29, 2002, and issued findings noting, inter alia, that Appellant had made "great progress in the area

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[1] The petition was subsequently amended on June 15, 2000, only to correct the misnaming of Appellant.

of substance abuse," but "concerns remain[ed] about stability and good judgment." The Court denied the application for leave to appeal by order of October 22, 2002. Appellant sought reconsideration of the denial for leave to appeal, and on March 13, 2003, the Court issued an order granting (1) Appellant's motion for reconsideration of the Court's order of October 22, 2002, and (2) the application for leave to appeal filed by Appellant.

In granting leave to appeal, the Court invited either party to submit a supplemental brief. Appellee submits this pleading for consideration by the Court.

STANDARD OF REVIEW

Appellant's challenge to the family court's termination decision must adhere to the appropriate standard of review. The family court needs clear and convincing evidence of only one statutory ground to terminate parental rights. See MCL 712A.19b(3); MSA 27.3178 (598.19b)(3). The petitioner bears the burden of proving at least one ground for termination. In re Trejo, 462 Mich 341, 350; 612 NW2d 407 (2001). This Court reviews a family court's decision to terminate parental rights under a clearly erroneous standard. MCR 5.974(I); In re Sours, 459 Mich 624, 633; 593 NW2d 520 (1999). A family court's finding is clearly erroneous when, although there is evidence to support it, the Court on the entire evidence is "left with a definite and firm conviction that a mistake has been made." In re Powers, 244 Mich App 111, 117-118; 624 NW2d 472 (2001).

ARGUMENTS

I. THE FAMILY COURT DID NOT ERR IN TERMINATING APPELLANT'S PARENTAL RIGHTS PURSUANT TO MCL 712.19B(3)(G); MSA 27.3178 (598.19B)(3)(G) (FAILURE TO PROVIDE PROPER CARE AND CUSTODY), WHERE CLEAR AND CONVINCING EVIDENCE ESTABLISHED APPELLANT HAD AN ATTACHMENT PROBLEM WITH HER SON AND FAILED TO MEET HIS NEEDS.

On appeal before this Court, as she did below, Appellant contends that there was insufficient evidence to terminate her parental rights. Specifically, Appellant argues that the family court erred in finding that she had "bonding and attachment" problems with her son because there was some evidence to the contrary. She further asserts that as a matter of law, a statutory basis to terminate parental rights cannot be predicated on a lack of a parental bond (or attachment) if the condition arose from separating the child while in foster care from the parent. Her arguments are unsupported in law and in fact.

Throughout the appeal, Appellant relies on In re Draper, 150 Mich App 789; 389 NW2d 179 (1986), vacated in part on other grounds, 428 Mich 851; 397 NW2d 524 (1987), for the proposition that "absent continued proof of neglectful behavior the mere lack of bonding due to separation while the child is in foster care is not enough to terminate parental rights" (see, e.g., "Reply to Answer in Opposition to Appellant's Application for Leave to Appeal," 1-2). Appellant, in relying on Draper however, completely ignores the statutory language of section 19b(3)(g), which expressly provides for termination in cases where

> "[t]he parent, *without regard to intent*, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." (Emphasis added.)

In construing this language, the Court long ago recognized that it is unnecessary to prove culpability in order to terminate parental rights under section 19b(b)(3)(g). See In re Jacobs, 433 Mich 24, 35-37; 444 NW2d 789 (1989) (recognizing section 19b legislatively amended to expressly state a showing of culpable or blameworthy neglect is not required for terminating parental rights). Thus, Appellant's culpability, or lack thereof, is immaterial to a determination of whether she can meet her child's needs.

Appellant's separation from her son arose from her own negative behavior and inability to maintain foster care placement with the child (in effect, Appellant elevated self-needs above the emotional and developmental needs of her son), unlike in Draper where the existence of a parental bond, or lack thereof, was affected by factors not necessarily within the parent's control (for instance, an extremely long distance separating children in foster care from their parent).[2] In further contrast to Draper, Appellant had the ability to maintain contact and visit with her child during foster care placement, thus there is no basis for her to argue that she was hindered from maintaining a parental bond (or attachment). (TH I, 117, 120). Inasmuch as Appellant is the primary reason for the separation from her son while he was in foster care

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[2] See, e.g., 1/22/01 Termination Hearing at 12, 15. The family court conducted the termination hearing on January 22, 2001 (Volume I) and March 7, 2001 (Volume II). The terminating hearing hereafter will be referred to as "TH", and each volume as either "I" or "II".

(resulting in them living together for about 3 months over foster care placement), Draper is inapt.[3]

As to Appellant attributing an improper motive to Catholic Social Services (CSS) for the way in which "bonding and attachment" issues allegedly came to the fore of the proceedings, the petition to terminate parental rights alleged in pertinent part that "[Appellant] attends visits with her son, however her conduct and behavior during those visits is inattentive and inappropriate towards said child, causing said agency to remain concerned that [Appellant] is unable to parent and protect said child." Additional evidence illustrating the concern with Appellant's parenting ability is reflected in the fact that in July 2000 (after the termination petition was filed), CSS referred Appellant to Elaine Hoogeboom for counseling on substance abuse issues without objection from Appellant.[4] (TH I, 66). Later, at the request of CSS

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[3] After being assigned this case, child welfare specialist Lora Holewinski testified that she initially tried to keep Appellant in foster care placement with Appellant's son (from February 1999 to March 1999), but Appellant failed to maintain placement. (TH I, 11, 115). Appellant was later referred to an in-patient substance abuse treatment and her son was continued in foster care (from April 1999 to September 1999), until Appellant completed the program and could be placed with the child. Following treatment, Appellant and her son were reunited in foster care (in September 1999), but Appellant again failed to maintain the placement and the child was placed in a fourth foster care home (from October 1999 to May 2000) and remained in foster care until termination (note the child was moved to a fifth foster care home where he remained from May 2000 onward). (TH I, 11, 118-121). (Also see amended termination petition and Opinion at 10-11, both chronicling Appellant's failure to maintain foster care placement.)

[4] Appellant came in contact with the foster care agency through a neglect petition brought against her mother (crack cocaine user) and on allegations of substance abuse (she was 17 years old and her son was 13 ½ months at the time of the initial petition). On April 21, 1999, she admitted to the allegation of an amended petition which read as follows:

1. Melissa Kucharski has a drug problem that affects her ability to parent a child.
2. Melissa has been smoking marijuana since January 1997.
3. Recently Melissa tested positive for marijuana. Melissa has refused treatment.

(4/21/99 Adjudication/Disposition Hearing, 5-14)

(through child welfare specialist Lora Holewinski), Hoogeboom worked on parenting issues with Appellant and evaluated her interaction with the child in weekly meetings commencing November 9, 2000.[5] (TH I, 19, 63). According to Holewinski, the referral to Hoogeboom was intended to provide Appellant "more parenting time" with her son to see if "she could develop a stronger attachment" with the child. (TH I, 21).

CSS also made a referral to Yvwania Richardson in December 2000, as part of its efforts to obtain an attachment assessment on Appellant and her son. (TH I, 19). Contrary to Appellant's assertion that Richardson was chosen by the foster care family as a "hired gun expert" for CSS (see "Respondent-Appellant's Motion for Reconsideration"), there is nothing in the record supporting that or, for that matter, any improper motive on the part of CSS in making the referral to Richardson.[6] Indeed, child welfare specialist Lora Holewinski testified that the referral to Richardson came to the agency through the "MCI state portion of child welfare." (TH I, 19).

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[5] By the time of the termination hearing on January 22, 2001, Hoogeboom had conducted six sessions with Appellant and her son.

[6] In the pleading papers, Appellant impugns the integrity of the proceedings by asserting that CSS conspired with the foster care family to terminate her parental rights. By way of example, Appellant attached a letter to the Motion for Reconsideration (see Exhibit A), which was addressed to the family court judge by relatives of the foster care family. Aside from its doubtful admissibility (double hearsay from relatives relating their understanding of the proceedings), there is no indication that the letter was made part of the record, that CSS ever responded to the letter, or that the family court relied on it in making its termination decision. Appellee respectfully submits that the letter should not be considered as it is not part of the record in the proceedings. See People v Shively, 230 Mich App 626, 628, n.1; 584 NW2d 740 (1998).

In the pleading papers, Appellant posits that CSS was dissatisfied with Hoogeboom and sought out Richardson to support the termination. However, CSS, according to Holewinski, made the referrals to Hoogeboom and Richardson in an effort to address its concern over bonding and attachment issues between Appellant and her child (in essence, to further assist Appellant with parenting issues). (TH I, 21, 19). To insinuate, as Appellant does, that CSS was somehow precluded from engaging the services of Richardson because it was already dealing with Hoogeboom, is folly. Further, there is no indication that by making the referrals, CSS sought to pit Hoogeboom against Richardson as suggested by Appellant. Indeed, Hoogeboom and Richardson had different qualifications and expertise.

Hoogeboom, a substance abuse counselor with 15 years experience, has a master's degree and accreditation in social work with credentials to provide family and marriage counseling in addition to substance abuse counseling. (TH I, 61-62). During the contested termination hearing, Hoogeboom indicated that her work experience included dealing with family issues (such as bonding and attachment), but she had *no* special training on bonding and attachment issues.[7] (TH I, 62-63, 66-67, 77).

Richardson, on the other hand, is a clinical therapist with 30 years experience who is employed as an executive director of a foster care agency (Alternative for Children and Families) in Flint, Michigan. She has a master's degree and accreditation in social work with special training on bonding and attachment issues. She does consulting work, is trained to

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[7] While Hoogeboom testified to attending "different seminars in various fields or attachment and such as looking at fetal alcohol syndrome, looking at learning disabilities, looking at attachment disorders in young children," she acknowledged that she did not have "the same type of attachment, or attachment education" (i.e., special training) as Yvwaina Richardson. (TH II, 92-93)

conduct attachment assessments and performs a number of them each year. During the termination hearing, Richardson also was qualified, without objection, as an expert in the area of child attachment and bonding. (TH II, 29-32, 57).

Appellant's primary assignment of error is that the family court gave greater weight to the testimony of Richardson than that of Hoogeboom. The court found Richardson "far more credible on the issue of attachment than Hoogeboom, who specializes on substance abuse issues." (Opinion, 11) The family court clearly is in a better position to weigh evidence and evaluate a witness' credibility. See Fletcher v. Fletcher, 229 Mich App 19; 28 NW2d 11 (1998).

Turning to the relative testimony of Richardson and Hoogeboom, Richardson, unlike Hoogeboom, gave a detailed description of the child attachment and bonding process. (TH II, 32-36). Richardson indicated that CSS, in making the referral for an attachment assessment on Appellant's child,[8] instructed her to simply determine whether the child had a healthy attachment to Appellant. (TH II, 36, 40). She further testified that Holewinski told her that she did not "want to bias [Richardson] one way or the other, I just want an attachment assessment. And the purpose of it was to look at how the interaction was and whether or not it was positive." (TH II, 40). Richardson conducted the assessment on December 5, 2000, in a one-hour meeting with Appellant and her son. (TH II, 40, 52). Regarding the length of time in

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[8] Richardson testified that prior to the referral from CSS, the foster care mother contacted her and inquired whether she conducted attachment assessments, to which Richardson responded in pertinent part that she preferred not to do assessments for individuals because "there was an expectation that I would do whatever it was that individual wanted me to do." (TH II, 50). Richardson had no other contact with the foster care mother. (TH II, 51). There is nothing in the record indicating that the referral by CSS was at the request of the foster care family, or that even if it was, Richardson would do whatever CSS wanted her to do in terms of conducting the assessment as alleged by Appellant.

which she conducted the attachment assessment, Richardson testified during cross-examination as follows:

> Q. [Respondent's Attorney] asked you some questions about how much time you spent on this evaluation. Did – did you spend any more or less time than you would typically spend on an evaluation or an assessment evaluation – an attachment evaluation, with one parent and one child?
>
> A. No. No, I didn't. I – I will explain that. After so many years of doing these assessments, there's certain things you look for. There's certain interactions that you learn to observe. There's certain behavior patterns that you learn to expect or look for when you're working in the context of parent/child interaction, much the same as a marriage counselor or any other therapist would learn his or her trade.
>
> And when you get in, you see them or you don't see them. You stay awhile, you consider things that may be affecting them. You consider situations that may be making something look one way when it's really not. You give it time to develop. And then you move along. [TH II, 62-63]

After observing Appellant with the child, Richardson testified to a number of concerns including the child's delayed speech development (typically attributable to a lack of parent-child interaction), his lack of proximity (closeness) to Appellant, their non-sustained interaction (child resisting interaction with mother and parallel playing), and the degree to which the child met his own needs. (TH II, 41-47). Richardson further indicated that she was aware that visits between Appellant and her son were suspended for three months (during the filing of the termination petition), but in responding to whether the separation would have any affect on attachment, she explained:

> "It would have an effect on the initial interaction that I saw. And that's why I made the statement that I did early on, that I watched the initial contact between them. And when he wasn't forthcoming, then I was free to assume that he was waiting for her to re-engage him and pull him back in because they'd been apart for a period of time." [TH II, 52]

Richardson noted that the first year of child development is "critical" and that "[b]y age nine months, children who've been with a consistent, predictable caretaker, can identify their

caretaker and pick them out from other people[.]" (TH II, 65). Appellant, according to Richardson, was struggling with substance abuse and there were substitute caretakers during Appellant's son's first year, which made it likely that Appellant's son experienced "quite a bit of upheaval and inconsistency." (TH II, 66). Richardson identified various problems that can result from a lack of parent-child attachment, and concluded that Appellant's son was at risk of life-long difficulties and needed a permanent, consistent environment. (TH II, 48, 63-65).

Hoogeboom testified that she observed no bonding and attachment problems between Appellant and her son, however she also reported that she never observed visits between them at CSS.[9] (TH I, 69, 91). She stated that while Holewinski expressed concern over the bonding and attachment between Appellant and her son, and asked her to work on parenting skills with Appellant, she had no expectations that Holewinski would attend the parenting classes she conducted with Appellant. (TH I, 95-96). She disagreed with Richardson's testimony, and recommended that Appellant be permanently reunited with her child with the understanding that Appellant would continue working on "attachment issues". (TH I, 75-76; TH II, 90).

In light of their respective testimony, Appellant has not shown clear error in the family court's credibility determination favoring Richardson. Nor has Appellant shown that the court clearly erred in giving greater weight to the testimony of Lora Holewinski, the child welfare specialist who worked on the case for 22 months. (TH I, 8-9).

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[9] Hoogeboom met with Appellant and her son during six sessions before the termination hearing on January 22, 2001, and after the hearing was adjourned until March 7, 2001, she met three more times with them, for a total of nine sessions from November 2000 until March 2001. (TH I 69; TH II 80-81, 87).

In attacking Holewinski's testimony, Appellant asserts that no bonding and attachment issues existed in 1999, and she references statements made by Holewinski during the first review hearing on July 22, 1999 (see "Application for Leave", 9). Holewinski, however, indicated that she was concerned about Appellant's parenting ability from the time Appellant came into care due to her substance abuse issues (during pregnancy and after the birth of her son). (TH II, 13-14). Also, at the July 1999 review hearing, Holewinski stated that she hoped foster care placement would "teach [Appellant] some of the parenting skills that she needs," and therefore, Holewinski refrained from making a referral to parenting classes at the time. (7/22/99 Review Hearing, 10-11, 14).

As the case progressed, Holewinski's concern over Appellant's parenting ability (particularly bonding and attachment) came into sharper focus because Appellant's behavior often was inappropriate during visits with her child (TH I, 14). Holewinski explained that during visitations, Appellant's focus was on outside stimuli, she displayed a peer relationship similar to brother/sister instead of mother/son, and she had a difficult time understanding the emotional or behavioral needs of the child (TH I, 15, 120). In addition, Holewinski testified that Appellant had a hard time redirecting her son's behavior, failed to utilize any discipline, had a "flat" affect when engaging him, and failed to demonstrate any skills learned through parenting classes (TH I, 16-17, 120-121). Despite making progress in other areas (e.g., sobriety, housing and finances), Holewinksi noted bonding and attachment issues were a continual concern. (TH I, 17, 104-110).

In light of her lengthy involvement in the case,[10] Holewinski disagreed with Hoogeboom and recommended termination due to "[t]he continued lack of attachment, [Appellant's] parenting time, [and] her inability to identify [her son's] needs [i.e., emotional, social, and developmental needs] prior to her own." (TH I, 24, 29, 125). According to Holewinski, Appellant's son has special needs and deserved permanence and stability, which Appellant was unable to provide (TH I, 24-25, 125).

While Appellant acknowledges the evidence supporting the family court's findings relating to Holewinski's testimony on attachment problems (see "Application for Leave to Appeal", 28-30), Appellant claims Hoogeboom's testimony was entitled to greater weight without establishing clear error. She seeks to rely on Hoogeboom's testimony because she considers it supportive of reunification. However, Appellant dealt with Hoogbeboom and Richardson after the termination petition was filed in a self-effort to improve her chances of being reunited with her child, and the fact that her dealings with Richardson did not favor reunification is highly relevant and should not be discounted as Appellant proposes. Appellant further asserts that "anyone can cherry pick and spin" Dr. Ronald Vanderbeck's report and testimony, but the record indicates he had concerns about Appellant's personality traits and functioning. Indeed, his prognosis for eventual return of the child to Appellant was guarded due to her self-centered personality.[11] (TH I, 48-49, 51, 57-58; Opinion, 7). In addition, the

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[10] In the three months leading to the termination hearing in January 2001, Holewinski observed seven or eight agency visits between Appellant and her son (note too Holewinski observed visits between Appellant and her son during her entire involvement with the case) (TH I, 112, 120-121).

[11] Dr. Vanderbeck did not complete the psychological evaluation until August 2000, several months after the termination was filed because of Appellant's uncooperativeness. (TH I, 41-42).

Appellant required additional therapy to work on "attachment issues" that given her child's immediate need for stability and permanence, would not be overcome in a reasonable amount of time (TH I, 24-25, 31, 125; TH II, 48, 90).

The evidence on the whole record establishes, in a clear and convincing manner, that despite being given many chances, Appellant failed to provide proper care and custody for her son and had a fundamental inability to be a fit parent (notwithstanding positive life changes in other areas as noted by the family court, Opinion 10). Accordingly, the family court did not err in terminating parental rights under section 19b(3)(g).[12]

II. SINCE THE FAMILY COURT NEEDED ONLY ONE STATUTORY GROUND FOR TERMINATION AND FOUND CLEAR AND CONVINCING EVIDENCE SUPPORTING TERMINATION UNDER MCL 712.19B(3)(G); MSA 27.3178 (598.19B)(3)(G), THE ADDITIONAL FINDING THAT TERMINATION WAS WARRANTED UNDER A STATUTORY GROUND NOT ALLEGED IN THE TERMINATION PETITION (TO WIT, MCL 712.19B(3)(C)(II); MSA 27.3178 (598.19B)(C)(II)) IS HARMLESS.

In addition to section 19b(3)(g), Appellee asserted a statutory ground for termination under section 19(3)(c)(i) (failure to rectify conditions leading to adjudication), but the family court made no finding under that subsection. The court instead found termination was warranted under section 19b(3)(c)(ii), which provides for termination as follows:

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[12] Once a statutory ground for termination has been met by clear and convincing evidence, termination of parental rights is mandatory unless the family court finds that termination clearly is not in the child's best interest. MCL 712.19b(5); Trejo, 462 Mich at 353-54. This Court reviews for clear error a family court's decision regarding the child's best interest. Id. at 356-357. Appellant does not challenge the family court's decision regarding the child's best interest.

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds ... the following:

* * *

(ii) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing and has been given reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

While section 19b(3)(c)(ii) was not alleged in the termination petition, the trial court's reliance on a statutory ground for termination different from that alleged in the termination petition does not violate due process so long as Appellant was "given adequate notice of the proofs that [she] would have to present to overcome termination . . ." In re Perry, 193 Mich App 648, 651; 484 NW2d 768 (1992). Here, Appellant was sufficiently alerted to the concern over her parenting ability. For instance, she worked with Hoogeboom on substance abuse and parenting issues. She also sought an independent expert and evaluation on attachment in an effort to overcome termination (see "Stipulation and Order" filed 3/5/01; also see 5/31/01 Motion for Rehearing, 5-6). Appellant nevertheless contends that she did not receive reasonable notice of the concern with "bonding and attachment," nor she claims was she given recommendations or a reasonable opportunity to rectify the concern.

Even if termination of parental rights is erroneous under one statutory ground, the error can be harmless if the family court also properly found another statutory ground for termination. Powers, 244 Mich App at 118. To the extent the family court erred in relying on section 19b(3)(c)(ii) in terminating Appellant's parental rights, any error was harmless because only one statutory ground for termination is required and the family court properly found that

Appellee had shown by clear and convincing evidence that termination was warranted under section 19b(3)(g).

Accordingly, the Court should uphold the family court's termination decision.

RELIEF REQUESTED

Wherefore, for the reasons set forth herein, Plaintiff respectfully pray that the decision terminating Appellant's parental rights in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

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Dated: March 28, 2003

By: _____
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